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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 823

CHARLES JOSEPH O'BRIEN AND THOMAS PARISI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 365 F. 2d 601. The opinion of the district court is reported at 255 F. Supp. 755.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1966. A petition for rehearing was denied on October 6, 1966. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 5, 1966, and the petition was filed on December 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 549 in pertinent part as follows:

> Whoever maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control; or
>
> Whoever receives or transports any merchandise or baggage unlawfully removed from any such vessel, vehicle, or warehouse, knowing the same to have been unlawfully removed—
>
> Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

QUESTIONS PRESENTED

1. Whether the indictment, tracking the relevant language of 18 U.S.C. 549, sufficiently alleged an offense under that statute.

2. Whether the final judge correctly treated the question whether a portion of the Detroit Harbor Terminal was a "bonded warehouse" as one of law.

3. Whether a remark by the prosecuting attorney in his closing rebuttal was a prejudicial comment on petitioners' failure to testify.

4. Whether, in a prosecution for unlawful removal of merchandise from a bonded warehouse, knowledge by petitioners that the area from which they removed the merchandise was a bonded area was an essential element of the offense.

STATEMENT

A three-count indictment charged petitioners with unlawfully removing merchandise from a bonded warehouse, in violation of 18 U.S.C. 549. After a jury trial in the United States District Court for the Eastern District of Michigan, Parisi was convicted on counts 2 and 3, and O'Brien was convicted on all counts.[1] On June 17, 1965, the Court sentenced Parisi to eighteen months' imprisonment and O'Brien to imprisonment for one year and one day. The court of appeals affirmed.

The merchandise involved in the indictment—fourteen cases of marble slabs and table tops, a statue and twenty-one cases containing brass valves and fittings and chrome valve handles—had been a part of the cargo of the SS *Montrose*, which sank in the Detroit River on July 30, 1962, and was subsequently salvaged (R. 339a). After being temporarily located at a dock, the merchandise was trucked to the Detroit Harbor Terminal and placed in a bonded portion of the terminal designated as Area B (R. 40a, 46a, 343a).

The evidence showed that a Mr. Mularoni, who had purchased the marble slabs and table tops from the ship's insurer, learned that Parisi had these items in his warehouse and was attempting to sell them (R. 25a–26a). Mularoni notified customs agents, who accompanied him to the warehouse, where all the merchandise referred to in the indictment was being kept (R. 62a–64a). After the agents placed Parisi under arrest, co-defendant Finazzo and petitioner O'Brien

[1] A co-defendant, Sam Finazzo, was acquitted by the district court on motion for judgment of acquittal (R. 181a).

entered the premises. Finazzo told the officers that, some months before, O'Brien had asked whether he was interested in picking up some "scrap" at the Detroit Harbor Terminal; that he had agreed to do so; and that he made arrangements with Parisi to pick up the merchandise in question (R. 70a). O'Brien told the agents that Mr. Young, the president of the Harbor Terminal, had asked him to remove the merchandise (R. 72a–73a).

At trial, the prosecution showed that there was a prescribed manner for releasing merchandise stored in a bonded area and that no authorized release was obtained for the items found in Parisi's possession (R. 125a–126a). Mr. Young testified that he knew O'Brien, but that he had never given him permission to remove the merchandise from Area B. He could not recall any conversations with O'Brien concerning the SS *Montrose* cargo (R. 119a–121a).

ARGUMENT

For reasons discussed below (pp. 10–12), we do not oppose a remand of case to the district court for further proceedings. Since the petition seeks a determination by this Court that the indictment should have been dismissed or that a new trial should have been granted, however, we shall first set forth in full our reasons for believing that petitioners' contentions were properly rejected by the court below and do not warrant further review.

1. The indictment, tracking the language of 18 U.S.C. 549, charged that petitioners "did unlawfully remove" merchandise from a bonded area and from

the custody and control of the United States Customs Service (R. 5a–6a). After the jury was sworn, petitioners, for the first time, moved to dismiss the indictment on the ground that the term "unlawfully" was too indefinite. They relied on *Keck* v. *United States*, 172 U.S. 434, in which an indictment charging a violation of the statute (presently 18 U.S.C. 545) prohibiting "importation contrary to law" was held insufficient in not specifying the manner in which the importation was illegal. The district court, after noting the lateness of the challenge, properly concluded that petitioners' contention lacked merit.

The rationale of the *Keck* case is that, since importation is not in itself unlawful, a charge of "importation contrary" to law must specify the statute which made the specific importation by the defendants illegal. The statute involved here, 18 U.S.C. 549, is significantly different. It prohibits unlawful removal of merchandise from a "bonded warehouse," a term which bears special legal significance in itself.[2] Unlike an indictment charging "importation contrary to law," which requires further elaboration, an indictment charging the unlawful removal of specific goods from a clearly defined location, such as a "bonded warehouse," is sufficiently definite to apprise persons named therein of the charge against them. See *Wil-*

[2] A "bonded warehouse" contains dutiable merchandise upon which no customs duties have been paid; so long as the goods remain within its confines no duty need be paid. The term implicates specific legal obligations. See *Rhenenthal Print Works* v. *United States*, 51 F. Supp. 208 (E.D. La.), affirmed, 141 F. 2d 211 (C.A. 5).

Isaacson v. *United States*, 310 F. 2d 192 (C.A. 9); *United States* v. *Davis*, 272 F. 2d 149 (C.A. 7).

Following the verdict, petitioners again moved to dismiss the indictment—this time on the ground that the term "unlawfully" was insufficient to allege the requisite felonious intent. This contention was based on the then recent decision of the First Circuit in *Hughes* v. *United States*, 338 F. 2d 651. Whatever the merit of the *Hughes* decision, petitioners plainly were not prejudiced by the form of the indictment in this case. Their criminal intent was clearly proved by evidence at the trial, and the court adequately instructed the jury that an unlawful intent was an essential element of the crime (R. 224a–225a). See *United States* v. *Deutch*, 235 F. 2d 853, 854 (C.A.D.C.).

Moreover, the district court (255 F. Supp. at 759) and the court of appeals (365 F. 2d at 604–605) correctly ruled that the term "unlawfully" in the indictment encompassed the necessary criminal intent. As used in the statute, the term "unlawfully" means more than "without authority"—the term used in other sections of the statute. In view of this context, and in accord with the interpretation of similar terms in analogous statutes, the courts quite appropriately read "unlawfully" here to mean both without authority and with criminal intent. See *Logsdon* v. *United States*, 253 F. 2d 12, 14 (C.A. 6); *United States* v. *Amoroso*, 167 F. 2d 596 (C.A. 3).

Although the decisions below are not in accord with the First Circuit's decision in *Hughes*, we do not believe that the conflict on this question of pleading is

of sufficient importance to warrant review of this case. See *Gay* v. *United States*, 326 F. 2d 196 (C.A. 10), certiorari denied, 377 U.S. 1000. Resolution of the conflict is not essential where, as here, "the only effect of lack of uniformity [is] to require district attorneys in certain circuits, in drafting indictments, to add a few words not elsewhere necessary." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 268, n. 73 (1934).

2. At trial, extensive evidence was produced by the government to show that the intricate legal steps required to constitute Area B of the Detroit Harbor Terminal a "bonded warehouse" had been carried out before the merchandise in question was deposited there. After the closing arguments, the trial judge advised counsel that he would leave to the jury the question whether the merchandise was in the custody of Customs when allegedly removed, but that he would hold as a matter of law that Area B was a Class 4 bonded warehouse (R. 203a). In his instructions to the jury, the district judge stated (R. 220-221a):

> It is the claim of the Government in this case, among other things, that the United States Customs Service took custody and control of the merchandise in question on the docks of the Nicholson Transit Company after it was allegedly unloaded from the Steamship Montrose, and that the United States Customs Service thereafter retained custody and control of such merchandise by placing same under what has been referred to in the evidence in this case as General Orders, and by also placing

same in storage, in the Detroit Harbor Terminal in an area designated in the applicable regulations as a Class 4 bonded warehouse.

The legal effect of Exhibits 27, 27-A and 27-B—that is the application, the sketch and the bond pertaining to storage Area B of the Detroit Harbor Terminal, and the evidence pertaining thereto—would be to constitute such storage Area B as a Class 4 bonded warehouse, as a matter of law, pursuant to the applicable statutes and regulations.

The court then instructed that if the jury found that the goods were not in a bonded warehouse when removed, their verdict must be not guilty.

The trial court's ruling that Area B was a bonded warehouse did not invade the province of the jury as petitioners contend. The term, "bonded warehouse," implies a definite legal status and distinct legal rights and obligations. Whether that status applied to the warehouse involved here was a question of law for the court. See *Blumenthal* v. *United States*, 88 F. 2d 522, 528 (C.A. 8). The cases relied upon by petitioners are inapposite. Most of them involve situations in which the trial judge commanded the jury to accept the government's undisputed version of the facts, thus depriving the jury of the freedom to reject the government's evidence.[1] As we have shown, the jury was not deprived of this freedom here.

3. During the course of the trial, testimony was elicited that petitioner O'Brien told customs agents

[1] In *Sullivan* v. *United States*, 178 F. 2d 723 (C.A.D.C.), also relied upon by petitioners, a conviction was reversed on the ground that the trial judge's comments on the facts were unfair.

that Mr. Young, the president of the Detroit Harbor Terminal, had asked him to remove the merchandise from the yard. Young testified that he had never given petitioner permission to remove the goods (R. 121a). Neither petitioner took the witness stand. In his closing argument, government counsel pointed to the fact—testified to by Young—that O'Brien had not spoken to Young during the year and a half between arrest and trial and had never asked Young to recall the alleged conversation as recited by O'Brien. Counsel argued (R. 211a):

> Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of trial, and yet, Mr. Young testifies, "No, O'Brien never has talked to me since about this subject." *And there is no contradiction of that at all in the record.* [Emphasis added.]

Petitioners claim that the italicized sentence was an improper comment upon their right to remain silent. Such a contention interprets the statement out of context, for a reading of the rebuttal argument in its entirety clearly shows that the comment referred only to the strength of Young's testimony and could hardly have been otherwise understood by the jury. See 365 F. 2d 607–609. Furthermore, the court, in its final instructions, warned the jury that no inferences of guilt should be drawn from the exercise of petitioners' constitutional right to remain silent and not testify (R. 231a).

4. The court did not err in failing to instruct that knowledge by petitioners that Area B was a bonded area was an essential element of the offense. The statute does not require such knowledge as a condition of conviction. In this respect it is like other federal statutes involving unlawful removal of property. With regard to these statutes, it is well settled that knowledge that the goods were improperly taken is an essential element of the offense, but knowledge that the stolen property had travelled in interstate commerce (the requisite jurisdictional element) is not essential to support a conviction. See *Corey* v. *United States*, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956; *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2), certiorari denied, 338 U.S. 815.

5. Pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term, decided *per curiam* December 12, 1966, we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the convictions of either of the petitioners. It appears from this inquiry that neither petitioner was the direct subject of electronic surveillance and that no such surveillance was conducted on the residence or business premises of either petitioner. We have discovered, however, that pursuant to the Departmental authorisation described at pages 2-3 of the Supplemental Memorandum for the United States in *Black* v. *United States*, 385 U.S. 26, No. 1029, O.T., 1965, the Federal Bureau of Investigation, on January 21, 1963, installed a microphone by trespass in a com-

mercial establishment which was owned by an acquaintance of petitioner O'Brien. The F.B.I. was then gathering intelligence concerning the said acquaintance, who was believed to be engaged in organized criminal activity. Petitioner O'Brien, we have learned, visited the surveilled premises shortly after the return of his indictment on May 8, 1963, and there engaged in a conversation with the owner concerning O'Brien's forthcoming trial. That conversation, although overheard by the monitoring agents and summarized in their logs, was not mentioned in any F.B.I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case.

It also appears from the logs of this surveillance, which continued until July 27, 1964, that petitioner O'Brien was on the premises and was overheard in January 1964, when he placed a telephone call and requested one of his attorneys to file an application relating to the territorial conditions of his release on bail.[4] This conversation, like the one in May 1963, was noted in the logs of the monitoring agents but was not communicated in any manner outside the F.B.I.

While making this notification to the Court pursuant to the policy announced in *Schipani*, we think it relevant to point out features distinguishing this case from *Black* and *Schipani*. First, unlike *Schipani*, no evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations. Second, unlike *Black*, the contents of the overheard conversations were not incorporated in

[4] The attorney's words were not overheard.

any F.B.I. memorandum and were not made known to the prosecuting attorneys in any form. Finally, while the petitioner overheard here was at least an "invitee" on the premises within the meaning of *Jones v. United States*, 362 U.S. 257, he was not, like the petitioner in *Black*, personally the subject of direct surveillance.

We enumerate these distinctions to point out to the Court that the *Black* and *Schipani* dispositions do not necessarily require that this case be remanded for a new trial. Notwithstanding the fact that one of the overheard conversations involved a communication by petitioner O'Brien to his attorney, it would be consistent with the *Black* decision, we submit, to remand this case for further proceedings in which the district court would determine, upon an adversary hearing, whether the overhearing of petitioner O'Brien's conversations produced any leads to evidence used at his trial and whether it affected the fairness of the trial in any manner. That court could then decide whether petitioners' convictions should stand.

Respectfully submitted.

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FEBRUARY 1967.

[1] Although no conversation of petitioner Parisi was overheard we do not oppose the same disposition of his case as is afforded petitioner O'Brien.

U.S. GOVERNMENT PRINTING OFFICE: 1967